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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. ~~765~~ 76

JAMES GALLICK,
Petitioner,

vs.

THE BALTIMORE AND OHIO RAILROAD COMPANY,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

RAYMOND T. JACKSON,
RUSSELL E. LEASURE,
ALEXANDER H. HADDEN,
Union Commerce Bldg.,
Cleveland 14, Ohio,
Attorneys for Respondent.

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In the Supreme Court of the United States

OCTOBER TERM, 1961.

No. 765.

JAMES GALLICK,

Petitioner,

vs.

THE BALTIMORE AND OHIO RAILROAD COMPANY,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

QUESTIONS PRESENTED FOR REVIEW.

Petitioner's statement of nine questions presented for review constitutes such a self-serving mixture of unwarranted assumption, argument, and repetition, that it does not permit an orderly answer or discussion.

There are only two basic questions presented for review by this petition, and they are:

1. Did the findings of the jury in its special verdict amount in law to a finding of no actionable negligence, and therefore require judgment for respondent?

(The jury rendered no general verdict.)

2. Were the probative *facts* in evidence sufficient to permit a jury to conclude "with reason" that employer negligence actually played a part in causing petitioner's illness?

STATEMENT OF THE CASE.

A. Introductory.

Petitioner has filed what amounts to a brief on the merits, and we are therefore compelled to do the same since petitioner demands not only allowance of the writ but final relief as well.

B. The Pleadings.

In petitioner's Amended Petition it was alleged that respondent railroad was negligent:

> "4. In that it failed to provide plaintiff with a reasonably safe place in which to perform his work duties."

During the trial the court struck specifications number 1, 2, 3 and 5 from the amended petition. (R. 495-7.) The remaining specification of negligence, number 6—charging unhealthful and unsanitary conditions, merely stated an included part of the more general charge of an unsafe place to work. Petitioner then further alleged that "as the direct and proximate result thereof, he was caused to be bitten by an insect which caused his system to become poisoned and which resulted in the formation of deep, acute ulcerations * * * about his extremities and body * * *." (See Petiton for Certiorari, pp. 61-3.)

In its Answer the respondent, after denying both negligence and causation, averred in part:

> "that if it be true that the illness or disease from which plaintiff now suffers was caused or contributed to by an insect bite sustained by him on defendant's premises or elsewhere, the likelihood of harm and consequences to plaintiff therefrom were beyond the realm of reasonable probability or foreseeability, * * *"

This averment was denied by petitioner in his Reply.

C. The Evidence.

Petitioner's statement of evidence is grossly incomplete. Additional important items of evidence are included in the following statement.

On the day in question (some unknown day in August, 1954) the petitioner was walking ahead of his engine along the west side of respondent's single track right of way, where it passed beneath a public street and overhead bridge known as the Columbus Road Bridge, in an industrial area adjacent to downtown Cleveland known as the "flats." The respondent's right of way was approximately 25 feet wide at this point, and was adjoined on both sides, as well as overhead, by property owned and maintained by third parties. Photographs in evidence reveal that bushes and weeds were growing generally in the area, and adjacent to the point where this occurrence allegedly took place.

On the far side of the track from petitioner there was a shallow surface drainage ditch containing a pool of water where dead pigeons, rats and insects had been observed upon occasion. These same conditions had existed for at least 10 years before (R. 99, 154), and there was no evidence whatever of anyone ever having been bitten, having suffered any injury, or having contracted any disease either at or near this location. The only insects that were identified at or near the pool were the usual insects found everywhere in and around Cleveland in August. (R. 253, 557.) The Cuyahoga River nearby carried raw sewage from the entire valley upriver. (R. 666-7, 670, 671.) And in the immediate area were steel mills, a garbage disposal plant, meat packing plants, junk yards, and other industries.

Immediately before proceeding to the point under the

bridge petitioner had been working for 10-15 minutes next to the Cuyahoga River. (R. 143.)

As petitioner stopped for "half a minute" or so under the bridge (R. 144) and at a point at least a track-width removed from the pool, he felt what he described as a "bite" on the back of his left leg just above the knee. He slapped at his pants leg and felt an object about the width of three finger tips beneath his pants leg which he squeezed between his finger tips and his thumb, and the object then dropped down his leg inside his pants leg. *The object was never observed by petitioner or anyone else.* (R. 110-11.)

Subsequently the petitioner developed an ulcer, to wit, an open sore (R. 375), on the back of his left leg above the knee, and in succeeding weeks and months other ulcers appeared on the surface of certain far removed parts of his body where admittedly he was never bitten. (R. 384-5, 392-3.) The ulcers looked like "an open sore from any cause" that later becomes pussy, except only that they grew larger and refused to heal. (R. 374-5, 405-6.) Petitioner's condition has been described variously as "pyoderma gangrenosa" and "chronic ulceration," but these medical terms describe merely the appearance, and not the cause, of his condition. (R. 445, 447.)

The medical cause of all of these ulcers is admittedly *wholly unknown.* (R. 295, 390-1, 445, 447-8, 450, 451, 455, 456, 458, 482.) The ulcers have never been identified medically as being either "bacterial, viral, allergic, malignant or neoplasm" in origin. (R. 447-8.) No bloodstream infection has ever been found to account for the many other ulcers that developed elsewhere on petitioner's body in the ensuing weeks and months, and no causative infection of any kind has ever been found. (R. 385, 455, 482.) Notwithstanding the fact that all known diagnostic tests have been performed, it is still not even known whether the cause

of the ulcers is an infectious disease, i.e., one capable of transmission from outside sources, or a non-infectious disease, i.e., one arising in the petitioner's own body. (R. 295, 447-8, 450, 452, 456, 468, 487.)

The evidence in the record on all the foregoing facts, both negative and positive, is uncontradicted.

D. The Jury's Findings.

No general verdict was returned. Among the jury's findings in the special verdict (consisting of 23 questions and answers in all) were the following:

> "13. Did the defendant B. & O., provide the plaintiff, Mr. Gallick, a reasonably safe place to work under the facts and circumstances existing at the time?
>
> "Answer: Jury can't decide on this question.
>
> * * * * *
>
> "20. If the answers to any one of the questions 1, 5, 6, 7, and 8[1] is yes, was there any reason for the defendant B. & O., to anticipate that such would or might probably result in a mishap or an injury?
>
> "Answer: No." (signed by 10 jurors.)
>
> * * * * *
>
> "22. If the answer to Question 21[2] is yes, was it within the realm of reasonable probability or foreseeability of the defendant B. & O. to appreciate this

---

[1] By its answers to questions 1, 5, 6, 7, and 8, the jury had found that: A pool of stagnant water existed under the Columbus Road Bridge (No. 1); dead pigeons accumulated there (No. 5); dead rats accumulated there (No. 6); vermin accumulated there (No. 7); and bugs accumulated there (No. 8).

[2] Question 21 and the jury's answer thereto were:

> "21. Was there a proximate causal relationship to (sic) the stagnant water, the dead pigeons, the insect bite and the present physical condition of the plaintiff?
>
> "Answer: Yes." (signed by 12 jurors.)

proximate causal relationship between the stagnant water, the dead rats, the dead pigeons, the insect bite and the present physical condition of the plaintiff?

"Answer: No." (signed by 12 jurors.)

It takes only nine jurors to agree on findings in Ohio.

ARGUMENT AND LAW.

Summary.

1. The jury found directly and specifically that the respondent had no reason to anticipate or foresee that a mishap or injury was likely to result from the property conditions existing. This finding amounted in law to a finding of no actionable negligence. And negligence is required under the Federal Employers' Liability Act. In addition, the jury could not agree, and in fact did not find, that respondent had failed to provide petitioner with a safe place to work, which was the sole substantive neglect charged, thus resolving that issue against petitioner who had the burden of proof.

The finding of non-foreseeability, and therefore of no negligence, is overwhelmingly supported, and even compelled as a matter of law, by the uncontroverted evidence here. It is undisputed that the conditions complained of had existed for at least ten years prior to August 1954 without any ill effects of any kind to anyone. And further, there was no evidence whatever: (1) that anyone had ever suffered an injurious insect bite or other injury at or near this pool; or (2) that any recognized insect transmitters of disease indigenous to northern Ohio lived, or were likely to live, in or near this pool; or (3) that any known communicable disease organisms endemic to northern Ohio resided, or were likely to reside, in this pool.

2. Petitioner admittedly had no knowledge of facts which would identify the alleged "biting" object he felt

beneath his pants leg as an insect, as distinguished from some other object, animate or inanimate. There were admittedly no facts presented, scientific or otherwise, to identify the species of the "insect" that "bit" petitioner, and thereby to localize or restrict its likely source. The doctors admittedly do not know the medical cause of petitioner's chronic ulcers—even as to whether they are infectious or non-infectious in origin. From this it is apparent that petitioner's theory of "proof" of causation in this case, to wit, that he was bitten by an insect, that the insect came from this particular pool, and that the insect transmitted an infectious disease from this pool to the petitioner, presents only a pyramid of cumulative assumptions. The probative *facts* in evidence are not sufficient to permit a jury to conclude "with reason" that respondent's premises actually caused petitioner's illness.

A. THE FINDINGS OF THE JURY JUSTIFY FINAL JUDGMENT FOR RESPONDENT.

Petitioner seeks to ignore, and indeed does not even mention, the jury's findings in the special verdict which justify final judgment for respondent. No general verdict was submitted in this case. A special verdict was prepared by the court and submitted to the jury pursuant to Section 2315.15, Revised Code of Ohio.

1. The Jury Refused to Find That the Workplace Was Unsafe, Which Was the Sole Substantive Neglect Charged.

In answer to Question 13 of the special verdict the jury was unable to agree that the all-inclusive allegation of an unsafe place to work had been proved. This amounted to a finding against the party with the burden of proof, i.e., petitioner. *Masters v. New York Central R. Co.*,

147 Ohio St. 293, 298, 70 N. E. 2d 898, cert. den. 331 U. S. 836; *Noseda v. Delmul* (par. 2 of syllabus); 123 Ohio St. 647, 653, 176 N. E. 571; *Minneapolis & St. L. R. Co. v. Bombolis*, 241 U. S. 211, 217-8; *Chesapeake and Ohio Ry. Co. v. DeAtley*, 241 U. S. 310, 316-7; *Davis v. Louisville and Nashville R. Co.* (App. Ct. of Ind.), 173 N. E. 2d 749, 753, cert. den. on March 19, 1962, Docket No. 688; 38 *American Jurisprudence*, 1095-6 Section 374.

In answer to Question 17, a *testing* interrogatory, the jury expressly did not find that the pool or its contents were unsafe in any way. This too operated as a finding against petitioner on the sole substantive neglect charged. *Masters v. New York Central R. Co., supra,* (147 Ohio St. 293, par. 2 of syllabus); *Gelfand v. Strohecker, Inc.*, 150 F. Supp. 655, 662-3, affirmed 243 F. 2d 797. (Question 17 and the answer thereto appear at page 53 of the Petition for Certiorari herein.)

2. There Was a Direct Finding by the Jury of No Foreseeability of Injury, and Therefore of No Negligence as a Matter of Law.

In answer to Questions 20 and 22 of the special verdict the jury found directly and affirmatively that the defendant had no reason to anticipate or foresee "any mishap or injury" from the property conditions existing (as described and found in the answers to Questions 1, 5, 6, 7 and 8.)

These findings amount in law to a finding of no actionable negligence. *Dalehite v. U. S.*, 346 U. S. 15, 42, 73 S. Ct. 956; *U. S. v. Republic of France*, 5th Cir., 290 F. 2d 395, 399-401, cert. den. Feb. 28, 1962; *Berry, Admx. v. Atlantic C. L. R. Co.*, 273 F. 2d 572, 578, cert. den. 362 U. S. 176; *McKinney v. Appalachian Elec. P. Co.*, 261 F. 2d 292, 295, cert. den. 359 U. S. 926; *Merrill v. Beaute Vues*

Co., 235 F. 2d 893, 896; *Johnson v. Kosmos Cement Co.*, 6th Cir., 64 F. 2d 193, 195, cert. den. 290 U. S. 641; *Palsgraf v. Long Island R. Co.*, 248 N. Y. 339, 162 N. E. 99 (1928); *McPherson v. Buick Motor Co.*, 217 N. Y. 382, 389, 111 N. E. 1050, 1053; *Hetrick, Admx. v. Marion-Reserve Coal Co.*, 141 Ohio St. 347; *Davis v. Cleveland Ry. Co.*, 135 Ohio St. 401; 2 *Restatement of Torts*, pp. 738, 744-45, 816-18; *Prosser on Torts*, 2d Ed., pp. 121-122, 274-276, 324; 2 *Harper & James, Torts*, pp. 929-30, 1134.

Negligence is required under the Act. And the test of "foreseeable danger," or knowledge of "likelihood of injury," is applied to test a railroad's negligence under the Act, as it is in other negligence cases. *Inman v. Baltimore and Ohio R. Co.*, 361 U. S. 138, 140; *Ringhiser v. Chesapeake & O. R. Co.*, 354 U. S. 901, 903, 905; *Rogers v. Missouri Pacific R. Co.*, 352 U. S. 500, 503; *Brady v. Southern Ry. Co.*, 320 U. S. 476, 483; *Siegrist v. Delaware, etc. R. Co.*, 2d Cir., 263 F. 2d 616, 618-9, cert. den. 360 U. S. 917.

Lack of foreseeability was also pleaded affirmatively in the Answer and denied by the Reply, thus making it one of the issues framed by the pleadings, within the purview of Sections 2315.15 and 2315.16, Revised Code of Ohio, dealing with special verdicts and special interrogatories. Rule 49(a) of the Federal Rules of Civil Procedure would also have required the submission of the issue of "foreseeability" to the jury as part of a special verdict. And by the express terms of Section 2315.17, Revised Code of Ohio, as well as by the terms of Rule 49(b) of the Federal Rules of Civil Procedure, special findings of the jury which are inconsistent with its more general findings in a special verdict control the judgment. (The text of Sections 2315.15 and 2315.17 of the Ohio statutes is not copied correctly in Appendix E of the Petition for Certiorari herein, but is copied correctly in Appendix A of this brief.)

Petitioner has argued below that Question 20 is not clear. This constitutes merely a desperate effort to avoid the clearly intended and twice repeated findings by the jury of no foreseeability of injury in answer to both Questions 20 and 22 of the special verdict.

In the case of *Ringhiser v. Chesapeake & O. R. Co.*, *supra* (354 U. S. 901), at pages 901, 903, and 905, the majority and minority members of this court agreed that the injury suffered by a plaintiff must be "a reasonably foreseeable consequence of the act or omission of the railroad" before liability can be imposed under the Act.

Judgment for respondent was therefore required as a matter of law upon the findings of the jury, and a reversal by the Court of Appeals was mandatory on this independent ground, in addition to those set forth by the Court in its opinion. This is true because it has been the undeviating rule in this Court that a respondent is free to urge affirmance, and this Court is free to affirm, upon any ground which supports the judgment below. *Lagnes v. Green*, 282 U. S. 531, 537-9; *Helvering v. Gowran*, 302 U. S. 238, 245; *Eli Lilly & Co. v. Save-On-Drugs, Inc.*, 366 U. S. 276, 283-4. Consequently, petitioner's strenuous effort throughout his petition to restrict this Court to considering the correctness of the text, and even the language, of the opinion below is unavailing, and he cannot thus prevent the consideration by this Court of the jury's special findings which are fatal to his case.

B. PETITIONER'S THEORY OF CAUSATION, AND THE ABSENCE OF FACTUAL PROOF.

Plaintiff's basic theory of causation is delineated at page 31 of the petition herein, and is as follows:

(1) that it was an "insect" that "bit" him;

(2) that the "insect" that supposedly bit him came from respondent's stagnant pool, as distinguished from other sources; and

(3) that the "insect" transmitted an infectious disease from this pool to petitioner.

We shall refer to the total insufficiencies of petitioner's factual proof in logical order.

We wish to make it clear that we do not intend to attack the credibility of any of the witnesses, nor the weight of any factual testimony. However, it is axiomatic that the admitted ignorance of vital facts is fatal to any ultimate conclusion based thereon.

Considerable quotation of testimony is being undertaken because no printed record is on file.

1. No Factual Proof of an Insect Bite at All.

The only facts on this subject were those provided by the testimony of the petitioner himself, the entire context of which on this subject was as follows:

"Q. Well, when you started to walk, tell court and jury what happened?

A. I was bitten after I took a few, a couple of steps.

* * * * *

Q. How do you know you were bitten?

A. Well, I know I was bit because I slapped my pants leg and crushed it.

Q. What do you *think* you crushed,

A. Well, it was *something*, some *insect*.

Q. Have you any idea as to the size of that insect?

A. Well, it was the width of them three fingers, overlapped, these three fingers.

* * * * *

Q. What happened after you crushed it?

A. I straightened out my leg to make sure, I felt something going down my leg, you know, it would go down.

* * * * *

Q. *Did you see it?*

A. *No, I didn't.*

Q. Have you ever seen it?

A. No, I haven't. (R. 109-111.)

* * * * *

Q. *Did you ever have another bite that felt like this?*

A. Yes—*no, not like this.*

Q. You never did?

A. No." (R. 263.) (Emphasis added.)

At another point petitioner had testified: "I don't know what it was that I felt", in referring to the object he felt beneath his pants leg. (R. 254.)

The petitioner did not testify that he felt any movement which would tend to identify "it" as a living thing. He admittedly never saw "it". In short, he testified to no *facts* whatever that would tend to identify this object as a living thing as distinguished from an inanimate object which would prick or puncture his skin, nor to any facts that would tend to identify it even as an insect as distinguished from some other living thing. It is apparent that the petitioner's conclusion that it was "some insect" that "bit" him is a conclusion *based upon no probative facts whatever within his knowledge*. No other witness, lay or expert, even pretended to testify on this subject. And yet petitioner's entire theory is bottomed upon the initial premise that it was an insect that he felt, and nothing else.

All of the doctors who treated petitioner testified that there was nothing about the lesion on his leg that would tend to identify it medically as an insect bite. (R. 183, 190, 359-60, 481.) An ulcer is merely an open sore (R. 375), and all of his ulcers at the various places on his body had the same general appearance, to wit, that of an open sore from any cause. (R. 384-5, 393, 405-6.)

Petitioner's doctors also testified that any conclusion on their part that his first ulcer was secondary to an "insect bite" at that point was based *entirely* either upon the history of an insect bite given by the petitioner himself, or upon assumption to that effect in the hypothetical question, and was not based upon any medical findings. (R. 405-6, 481, 482, 485-6.)

It is apparent from the foregoing that any ultimate conclusion by the jury that it was an insect that petitioner felt would have to be based upon an admitted ignorance of *facts* necessary to such conclusion.

2. No Factual Proof That the Alleged Biting Insect Came From the Pool in Question.

Petitioner's fact witnesses Molnar and Rady testified only that they had seen wholly undescribed "bugs" around the pool in question during the month of August, 1954. When witness Clason was asked to describe the insects he had seen under the Columbus Road Bridge around the time in question, he stated: "I haven't seen any different insects there than anywhere else, in the flats or in the city for that matter." (R. 557.)

Upon trial, and contrary to a previous negative answer (R. 257-8), petitioner stated that he had seen insects on dead "hides" and on the ground of a size similar to the size of the object he felt within the folds of his pants leg

(R. 255, 257), but he could give no other identifying characteristics. (R. 253, 254.) The petitioner also gave the following significant testimony which accurately summarizes his admitted total ignorance of fact on the subject:

> "Q. It is a fact, isn't it, that you never saw anything under the Columbus Road Bridge, before the insect bite, that looked anything like the one that you felt when you snapped at your pant leg, isn't that so?
>
> A. *I don't know because I don't know what it was that I felt.*" (R. 254.)

In petitioner's brief in the Court of Appeals (at page 74 thereof) his attorneys also made the following significant admission on this subject:

> "* * * there was not one shred of evidence by either plaintiff or defendant which would possibly enable the jury" to identify the alleged insect.

Ignoring for the moment the contrary testimony of petitioner, as well as the obvious difficulty in accurately judging the size of an object through the folds of a pants leg, and taking petitioner's naked conclusion of size alone at face value, a legion of unanswered questions, giving rise to numberless mere possibilities, still remain. How many species of insects are there of this approximate size? Where do they live and breed? Are insects which feed or live on carrion likely to, or are they even equipped to, bite or sting man? Do such insects crawl or fly? Are they capable of crawling up inside a pants leg? Are there any practical means of controlling their number or movement? Petitioner's case is entirely silent on these points, and petitioner called no entomologist as a witness. The common experience of jurors can scarcely be relied upon to fill the void, where the species itself is admittedly unknown.

Despite petitioner's claim to the contrary (pages 16-17 of the Petition herein) there was no evidence whatever that it was *only* on carrion that insects of the size of this object were to be found. The record contains no such limiting evidence, and common knowledge dictates that bumble bees, wasps, and grasshoppers, to name but a few, are insects of similar size prevalent in such a neighborhood in August, and that none of these is attracted by carrion.

It is also common knowledge, and therefore judicially noticeable, that there are "from two to four million different species of insects" known to exist—a "vast number" of which "only exist in conjunction with vegetation"; also, that there are "from 500 to 2,000 insects in and on a square yard of rich, moist soil," and "roughly 4,000,000 insects exist on one moist acre." (12 *Enc. Brit.*, 1960, pp. 395 *et seq.*; 12 *Enc. Brit.*, 1941, 405-422.) There are likewise over one million known *species* of six-legged insects alone, which include all large sizes and kinds of beetles, wasps, bees, flies, and the like, some of which bite man and some of which do not. (177 *Jour. Am. Med. Assn.*, p. 505, 1961.)

When Dr. Stearns, the only entomologist called, was examined on the subject his *unrebutted scientific testimony was that the only insects that bite humans that would be attracted by, or live in, this pool or its contents are mosquitoes.* (R. 631.) He further testified that the only insect in this part of the country near the size of the object felt by petitioner that is known to attack man, is the horse fly, but that this insect would *not* be attracted by the conditions complained of here. (R. 631-2.) Giant water bugs, which are attracted by street lights at night, would *not* live in a stagnant drainage pool, and they are *not* attracted by humans. (R. 662.) He further testified that the only sizeable insects attracted by dead animal bodies are certain kinds of

burying beetles, *but that these do not bite or sting man.* (R. 660-1.)

Even if Dr. Stearns' uncontradicted scientific testimony is given no effect, any ultimate conclusion that a *biting* insect came from respondent's pool, as distinguished from other sources, must be based upon pure guess by choosing among literally thousands of mere possibilities concerning the millions of species of insects, and not upon any probative *facts* in the record, nor upon any scientific knowledge whatever.

Although Drs. Ippolito and Anderson, petitioner's medical witnesses, both admittedly reasoned, in order to answer a hypothetical question, that the assumed but wholly unidentified "insect" of the size described, more probably came from the pool than from any other source, yet both *admitted that they had no specialized knowledge whatever of insects or their habits.*

Dr. Ippolito testified on this subject as follows:

"Q. Now, on the subject of insects, do you hold yourself out as a specialist in that field.

A. No, sir.

Q. I take it you do not have any specialized knowledge as to the particular kinds of insects, of their *nature*, their *habits* and so forth?

A. No, sir, I do not.

Q. Do you know of *any* insect in this area of the country that *measures about one-half inch by two inches* that is known to attack human beings?

A. *As I mentioned before, I am not a specialist in insects. Therefore, I can't answer that.*" (R. 356.)

* * * * *

"Q. Doctor, in the hypothetical question given you by Mr. Dudnik, there was no identity of the kind of insect, was there?

A. No, not the identity of it.

Q. As to type or species?

A. Right.

Q. You don't know medically, do you, what kind or type of insects may have bitten Mr. Gallick?

A. Not what type or what species or what family, no, sir." (R. 400.) (Emphasis added.)

Dr. Anderson likewise repeatedly disclaimed any specialized knowledge on the subject (R. 463, 466, 479, 481-2), and testified, in part:

"Q. Doctor, do you have any specialized knowledge of the habits of insects?

A. No, I do not, sir." (R. 463.)

* * * * *

"Q. Do you know of any insect that is a half-inch in diameter and two inches long (the size assumed in the hypothetical question) that is known to attack man?

A. Not specifically, sir, no.

Q. *I take it, then, you have no ideas as to what the habits of such an insect, if it exists, might be?*

A. *No, sir, I do not.*" (R. 479.) (Emphasis added.)

The foregoing admissions of ignorance of fact and of lack of specialized knowledge, render the doctors' opinions as to the probable source of an insect of this size, legally incompetent and without weight. *Rhodes v. U. S.*, 4th Cir., 282 F. 2d 59, 61, 62 (1960); *Atlantic Life Ins. Co. v. Vaughan*, 6th Cir., 71 F. 2d 394, 395-6, cert. den. 293 U. S. 589; *Olsen v. Electric Auto-Lite Co.*, 164 Ohio St. 283, 284; 130 N. E. 2d 363; *Burens v. Industrial Commission*, 162 Ohio St. 549, 553-5; 124 N. E. 2d 724; *Moore v. State*, 17 Ohio St. 521; 66 *A. L. R.* 2d, 1086-7.

Another independent but vital question is: *When* did the supposed insect get onto the petitioner? Once again the record is barren of any relevant probative fact, and

any answer is left to pure guess. It is uncontradicted, however, that petitioner had been standing for only a matter of about 30 to 45 seconds near the pool before the "bite"; that the object at that time was up inside his pants leg to a point above his knee; that immediately prior thereto the petitioner had been at a point adjacent to the Cuyahoga River for approximately 15 minutes, and had walked directly from there to the point under the bridge; and that the petitioner never felt anything crawling or moving inside his pants leg. The only expert (Dr. Stearns) testified uncontradictedly that it would take any insect of the size of the object felt by petitioner, at least several minutes (5 to 10) to get from his ankle up inside his pants leg to a point above his knee. (R. 635.)

Certainly common knowledge cannot suffice where the species of insect is admittedly unknown. Any conclusion then as to *when* the supposed insect got upon petitioner must also rest upon pure guess, *i.e.*, total ignorance of any probative facts.

3. No Factual Proof That the Pool In Question Was the Source of Petitioner's Illness.

There was no factual proof that this pool was the source of petitioner's numerous ulcers for one very basic reason: The medical cause of his ulcers has admittedly never been determined. It is not known by the medical profession whether the ulcers are of "bacteriologic, viral, allergic, malignant, or neoplasma origin." (R. 448.) In short, the cause is a medical enigma insofar as any known medical facts are concerned. (R. 456.)

In the weeks and months following petitioner's first ulcer, additional red swellings started to appear on distant parts of the body, where petitioner concededly had never been bitten by an insect. (R. 384-5, 392-3, 405-6.) These

swellings also broke down and became open sores. (R. 384, 385, 393.) Repeated cultures and tests, including blood cultures, have never revealed any causative infection or possible means of transmission from one site to another. (R. 386-9, 395, 452, 454-6.)

The first doctor to see petitioner described a "boil-like" lesion on his left leg, and testified that a boil is caused by staphylococcus, a kind of bacteria commonly found in the air and on all surfaces including a person's skin. (R. 178-9, 181-2, 184, 191, 193.) But the first smear ever taken from the first lesion revealed no staphylococcus, nor any other causative organisms. (R. 295, 386-7, 392-4, 407.) The fact that varying non-specific infections were later found in the ulcers admittedly does not indicate an infectious cause, because ulcers caused by non-infectious diseases, such as diabetes, all become chronically infected *after* they become open sores, due to the entry of ordinary surface and air contaminants. (R. 374-5, 452, 456.)

Dr. Ippolito summarized petitioner's condition after the months spent in Marymount Hospital as follows:

> "The patient * * * has had a lengthy hospitalization here as a result of multiple ulcerations of the skin due to pyoderma gangrenosa, *specific etiology unknown*." (R. 295.) (Emphasis added.)
>
> * * * * *
>
> "Q. Etiology means what, doctor?
>
> A. Etiology means the specific cause of a condition." (R. 390-1.)

The meaning of the terms "pyoderma gangrenosa" and "etiology" was further stated by Dr. Anderson, as follows:

> "Q. Will you tell us the meaning of the medical term *pyoderma-gangrenosa*?
>
> A. Yes, sir. It is a descriptive term and *only a descriptive term*.

Q. By that you mean what?

A. It describes three things. Pyo means pus. Derma means skin. And gangrenosa means necrosis.

Q. But the term *pyoderma-gangrenosa does not include a description or reference to any cause?*

A. *No, it does not.*" (R. 445.)

* * * * *

"Q. What is the definition of the word *etiology*, Doctor?

A. *Cause.*" (R. 458.) (Emphasis added.)

Dr. Anderson also testified as follows:

"Q. Doctor, at the time of Mr. Gallick's final release from the hospital [Cleveland Clinic], which I think you told us was perhaps last July [1958], at the time he was taken from your hospital out to Highland View, was there a diagnosis entered?

A. This same diagnosis.

Q. What was that?

A. *Chronic ulceration.*

Q. Chronic ulceration.

A. Yes.

Q. *Once again, just a descriptive term?*

A. *Yes.*" (R. 447.)

* * * * *

"Q. It does not relate to the cause, the basic cause?

A. It doesn't relate to the bacterial cause or the viral cause, no.

Q. Or some other cause if another cause exists?

A. Of the immediate cause. In terms of organism, no.

Q. *Now, all the time that he was there at the Cleveland Clinic, Doctor, did you ever determine the basic cause of Mr. Gallick's condition?*

A. You mean in terms of this organism that we are talking about?

Q. Well, do you know that we are talking about an organism, or is that theoretical?

A. For the moment it is *theoretical. I don't know what the immediate cause was.*

Q. All right. In other words, after *two years* at the Cleveland Clinic the folks out there still did not determine the immediate cause of his condition?

A. *We found no bacteriologic or viral, allergic, malignant, neoplasma origin for his ulcers.*" (R. 447-8.)

* * * * *

Q. "Now, you mentioned bacteria and virus. There are *other things,* too are there not, such as allergy, sensitivities, systemic disease, or conditions?

A. Yes, sir. We reviewed every one of those.

Q. You just didn't find the answer any place here, did you?

A. Not in terms of what you mentioned, no, sir.

Q. *So you still don't know why his ulcers didn't heal up and you don't know why new ones developed, do you?*

A. *This is correct.*

Q. And that is after two years of study out there at your hospital?

A. Yes, sir." (R. 450.)

* * * * *

"Q. And having made a *differential diagnosis,* you still have not been able to determine the—I want to get the right word, I don't want you to quarrel with me—I think you used the word immediate, the producing cause of these ulcers?

A. The immediate producing cause, yes.

Q. And their failure to heal?

A. Yes." (R. 451.)

* * * * *

"Q. *So you still after all these studies are not able to tell us the immediate cause of his condition?*

A. *Very true.*" (R. 455.)

* * * * *

"Q. Well, let me ask you this, Doctor: Don't we

have ulcers developing, let's say, in *diabetes*?

A. Yes, sir, and *they all become chronically infected*." (R. 452.)

* * * * *

"Q. And if his ulcers are caused by a systemic disease or allergy, they would still be infected, wouldn't they?

A. I would think so, yes."

* * * * *

"Q. *Until you find the specific and immediate cause you can't really rule out anything, can you?*

A. *Not a single thing.*" (R. 456.)

Petitioner puts great emphasis upon Dr. Davis' testimony to the effect that an insect bite is a trauma, and that trauma "can" cause "pyoderma gangrenosa." By definition this means only that trauma "can" cause a pussy skin ulcer. Any schoolboy with a pussy skinned knee knows this. (R. 405-6.) But this provides no evidence of the medical cause of petitioner's numerous ulcers, as petitioner's own doctors admit.

With the medical cause of petitioner's illness being wholly unknown, and in the absence of any knowledge that it is a communicable disease at all, its reservoirs, if any, are not determinable. Therefore, it cannot be concluded with reason that the pool in question was the source of petitioner's illness.

C. THE JUDICIAL TEST TO BE APPLIED TO THE EVIDENCE.

In the case of *Rogers v. Missouri Pacific R. Co.*, *supra* (352 U. S. 500, 77 S. Ct. 443), and the decisions following it, including the *Inman* case, *supra* (361 U. S. 138), and the case of *New York, New Haven & Hartford Co. v. Henagan*, 364 U. S. 441, 81 S. Ct. 198 (1960), this Court has defined the required minimum proof to take a plaintiff's F. E. L. A.

case to the jury. In the *Rogers* case, at pages 506-7, the test is stated:

> "Under this statute the *test* of a jury case is simply whether the proofs justify *with reason* the conclusion that employer *negligence* played any part, even the slightest, in *producing* the injury or death for which damages are sought. * * * *Judges* are to fix their sights primarily to make that appraisal and, *if that test is met*, are bound to find that a case for the jury is made out whether or not the evidence allows the jury a choice of *other probabilities*." (Emphasis added.)

At page 19 of his petition petitioner very misleadingly quotes as a complete sentence only a *fragment* of a sentence appearing on page 653 of *Lavender v. Kurn*, 327 U. S. 645, dealing with the role of speculation and conjecture under certain conditions. Petitioner then seeks to draw the conclusion therefrom that speculation and conjecture alone are a sufficient foundation for liability. But this is obviously not the law and never has been, because the opinion in *Lavender* then immediately goes on to state that "when there is a complete absence of probative facts to support the conclusion reached," it is error to submit the case to the jury.

Under the *Rogers* rule the judicial test covers not only the subject of negligence, but also the question of whether negligence played a part in *producing* the injury complained of. Thus petitioner's argument that a verdict may not be directed upon a judicial determination of lack of proof of causation, as distinguished from negligence, is also not valid.

D. THE LEGAL INSUFFICIENCY OF THE EVIDENCE.

The Court of Appeals in the instant case was careful to recognize and apply the standards of the *Rogers* case. It recognized that the usual concept of proximate cause, as it is known in Ohio, is not to be applied here; that a "liberal attitude" must be adopted with respect to the legal sufficiency of the evidence; and that proof may "rest upon inferences to be drawn from the evidence." But the Court also recognized, and correctly so, that the Act does not make the employer an insurer; that "there must be proof of some causal relationship between employer negligence and the injury for death of the workman" before a jury case is made out; and that "there may be evidence which does not amount to proof." After reviewing the evidence as well as the lack of evidence of probative facts in the instant record, the appellate court then concluded:

> "Throughout all the cases involving employer liability, in cases such as we have before us, the United States Supreme Court has held that a right to recover is established if, from the facts proved, negligence and its causal relationship to the injury and damage may reasonably be inferred; a jury question is presented if, with reason, 'the conclusion may be drawn that negligence of the employer played any part at all in the injury.'
>
> * * * * *
>
> "* * * When there is neither direct evidence, nor reasonable inferences to be drawn from evidence, whether direct or circumstantial, a conclusion based upon such absence of evidence or reasonable inference is mere conjecture, and the drawing of a further inference from conjecture does not amount to proof. In proving a defendant's culpability, the proof must show that the tort is distinctly traceable as one of the efficient antecedents of the damages, and has a share in subjecting plaintiff to injury.
>
> * * * * *

"If the plaintiff's case is to be sustained, we must infer that this undescribed (except as to size and biting qualities) insect or bug had been attracted to the area in which the plaintiff was hurt by the stagnant pool, and that its bite caused the plaintiff's condition; that the pool created conditions and influences which helped to incubate or furnish an environment for the bug, whose bite was poisonous to the plaintiff; or, that the insect, having traveled from other areas, became contaminated or infected by the pool with a substance injurious to man, and that this substance infected the plaintiff when bitten.

"The law is plain that, before the question of causation can be submitted to a jury, the trial judge must decide a preliminary question—*i.e.*, whether from the evidence a jury could reasonably find the existence of a causal relation. If the judge decides in the affirmative, it will then be for the jury to say whether they do find. In other words, the judge must say whether on the evidence, a causal relation may be reasonably inferred. If the judge rules that it may be so inferred, the jurors then must say whether, from the evidence, the causal relation is inferred by them.

"The question of causation should not get to the jury, and the judge should direct a verdict for the defendant, unless the court is of the opinion that a jury can reasonably find that the defendant's tort was an efficient cause of the damage to the plaintiff *and not a mere antecedent fact.*

"As we view the record before us, we have a chain of possibilities that the negligence of the defendant might have shared in subjecting the plaintiff to damage and injury, but the proof of a legal causal connection between the negligence and damage falls short of that required for the consideration of a jury.

* * * * *

"We determine, therefore, that, where there is, as here, only a guess or speculation of a causal connection between the negligence of the employer and the

injury of an employee, no liability attaches, and a judgment based upon such speculation cannot be sustained." (Emphasis the court's; pp. 43-5 of Petition for Certiorari.)

Petitioner sets up a straw man by attempting to distinguish between a requirement of merely "some connection" between negligence and injury, as urged in the petition, and the requirement that negligence be "an efficient cause" of the injury, as stated in the appellate opinion. The petitioner takes words out of context and then seeks to draw an unwarranted conclusion. The full context of the appellate court's statement is as follows:

> "The question of causation should not get to the jury, and the judge should direct a verdict for the defendant, unless the court is of the opinion that a jury can reasonably find that the defendant's tort was an efficient cause of the damage to the plaintiff *and not a mere antecedent fact.*"

The adjective "efficient" means "effectual," which in turn means: "producing, or capable of producing." *The American College Dictionary*, Random House, 1954.

The court merely said that although the pool and contents existed, the probative facts in evidence did not justify "with reason" the conclusion that said conditions actually played a part in producing petitioner's illness. Thus the court correctly followed and applied the *Rogers* rule.

E. CASES CITED BY PETITIONER ON SUFFICIENCY OF PROOF DISTINGUISHED.

Petitioner cites numerous decisions in support of his claim that his purported proof of negligence and causation is legally sufficient upon judicial appraisal. In none of these cases are the facts similar to those in the case at bar.

The proof in each of the cases cited by petitioner was

clearly more substantial than the premises of total ignorance presented by the evidence in the case at bar. Also, in each of those cases there was direct evidence of the specific cause of the plaintiff's injury or death. In *Bailey v. Central Vermont R. Co.*, 319 U. S. 350, the plaintiff was injured when he fell from the defendant's trestle where he was required to work with unsafe footing. In *Davis v. Virginia Rwy. Co.*, 361 U. S. 354, 356, plaintiff was injured when he fell from the top of a boxcar where he was required to be due to the assignment of an inexperienced helper on a "rush" job. In *Gibson v. Thompson*, 355 U. S. 18, the plaintiff was injured when he fell on loose gravel in the yard of the railroad. In *Harris v. Pennsylvania R. Co.*, 361 U. S. 15, the plaintiff was injured when he fell on a slippery tie. In *Lavender v. Kurn*, 327 U. S. 645, the plaintiff was killed by receiving a blow to the head, and the resultant hole fit a loose hook swinging from the side of a boxcar operated by the defendant at the point of the accident. In *McBride v. Toledo-Terminal R. Co.*, 354 U. S. 517, the plaintiff lost his footing and fell on a boxcar due to insufficient lighting in the defendant's yard. In *Michalic v. Cleveland Tankers, Inc.*, 364 U. S. 325, a defective wrench supplied by defendant fell and smashed plaintiff's foot weakened by pre-existing Buerger's disease. In *Rogers v. Missouri Pacific R. Co.*, 352 U. S. 500, the plaintiff was injured when he fell from a culvert of defendant. In *Schultz v. Pennsylvania R. Co.*, 350 U. S. 523, 525, the decedent died from drowning when he fell from defendant's tugboat which was "dark, icy and unmanned." In *Sentilles v. Inter-Caribbean Shipping Corp.*, 361 U. S. 107, 110, the plaintiff was injured when he fell on defendant's pitching deck and, according to "direct medical testimony," his "latent tubercular condition actually was activated by the

trauma complained of." In *Stinson v. Atlantic Coastline R. Co.*, (88 So. 2d 189, 191), 355 U. S. 62, the engineer had been killed by being struck and his body dragged and severed by a heavy object running over it on defendant's track where defendant's locomotive and work train had been negligently operated shortly before; parts of decedent's stomach and lungs were found on the wheels of one of the cars of said train. The facts in *Tennant v. Peoria & P. U. R. Co.*, 321 U. S. 29, are substantially the same as in the *Stinson* case; there was no doubt but that he was killed by being run over by defendant's engine which had failed to ring its bell.

Petitioner seeks to distinguish the *Inman* and *Henagan* cases, *supra* (361 U. S. 138 and 364 U. S. 441 respectively) by stating that in those cases the injuries were caused by a third party over whom the railroad had no right of direction, and thus that the injury was not caused by employer negligence but by the actions of the third party. Of course the negligence claimed in those cases (unsafe crossing in *Inman* and a negligent failure to apply brakes in time in *Henagan*) does not permit such a simple rationale. But even this attempted distinction is not valid because in the case at bar it was an assumed wild insect which "bit" petitioner, and the possession of land does not carry with it the possession of, nor the legal responsibility for, indigenous wild insects which may be upon it. 3 *Restatement of Torts*, p. 12, Comment (a); p. 18, Comment a.

In each of the foregoing cases cited by petitioner this Court held that there were probative facts from which the jury could have found "with reason" that employer negligence actually produced the injury or death complained of. But in the case at bar the very cause of petitioner's illness (chronic skin ulcers) is wholly unknown. It is admittedly not known that the basic cause is a communi-

cable disease at all, thus leaving a complete and admitted hiatus between the alleged negligence and the "injury." And a jury cannot supply medical facts, nor "with reason" reach a medical conclusion in the absence of facts.

CONCLUSION.

In the case at bar, as in the *Inman* case, *supra*, the alleged unsafe condition had existed for at least 10 years with no known injury or mishap to anyone. There was also no proof that any known disease-bearing insects frequented the pool, nor that any known communicable disease endemic to Ohio was present in the pool. It is also admittedly not known that the cause of petitioner's illness (chronic skin ulcers) is a communicable disease at all. There is a complete absence of probative facts to support a conclusion with reason that employer negligence played a part in producing petitioner's illness. The Court of Appeals therefore was correct in concluding that a directed verdict was mandatory under the *Rogers* standard.

The jury failed and refused to find that the workplace was unsafe, which was the sole substantive neglect charged. There was also a direct finding by the jury of no foreseeability of injury, and therefore of no negligence as a matter of law. These findings of the jury entitled respondent to final judgment as ordered by the appellate court.

It appears that the judgment of the Court of Appeals is in accord with the applicable decisions of this Court, and the petition for certiorari should be denied.

Respectfully submitted,

RAYMOND T. JACKSON;
RUSSELL E. LEASURE,
ALEXANDER H. HADDEN,
Attorneys for Respondent.

APPENDIX A.

Statutes Involved.

Ohio Revised Code, Section 2315.15.

When requested by either party, the court shall submit in writing each determinative issue to be tried by the jury and direct the jury to give a special verdict.

Ohio Revised Code, Section 2315.16.

When either party requests it, the court shall instruct the jurors, if they render a general or special verdict, specially to find upon particular material allegations contained in the pleadings controverted by an adverse party, and submitted by the court in writing to the jury, and shall direct the jury to return a written finding thereon. The verdict and finding must be entered on the journal and filed with the clerk.

Ohio Revised Code, Section 2315.17.

When a special finding under Section 2315.16 of the Revised Code is inconsistent with the verdict, the former shall control the latter, and the court may give judgment accordingly.

APPENDIX B.

Federal Rules of Civil Procedure Involved.

Rule 49.

SPECIAL VERDICTS AND INTERROGATORIES.

(a) *Special Verdicts.* The court may require a jury to return only a special verdict in the form of a special written finding upon each issue of fact. In that event the court may submit to the jury written questions susceptible of categorical or other brief answer or may submit written forms of the several special findings which might properly be made under the pleadings and evidence; or it may use such other method of submitting the issues and requiring the written findings thereon as it deems most appropriate. The court shall give to the jury such explanation and instruction concerning the matter thus submitted as may be necessary to enable the jury to make its findings upon each issue. If in so doing the court omits any issue of fact raised by the pleadings or by the evidence, each party waives his right to a trial by jury of the issue so omitted unless before the jury retires he demands its submission to the jury. As to an issue omitted without such demand the court may make a finding; or, if it fails to do so, it shall be deemed to have made a finding in accord with the judgment on the special verdict.

(b) *General Verdict Accompanied by Answer to Interrogatories.* The court may submit to the jury, together with appropriate forms for a general verdict, written interrogatories upon one or more issues of fact the decision of which is necessary to a verdict. The court shall give such explanation or instruction as may be necessary to enable the jury both to make answers to the interrogatories and to render a general verdict, and the court shall direct the jury both to make written answers and to render

a general verdict. When the general verdict and the answers are harmonious, the court shall direct the entry of the appropriate judgment upon the verdict and answers. When the answers are consistent with each other but one or more is inconsistent with the general verdict, the court may direct the entry of judgment in accordance with the answers, notwithstanding the general verdict or may return the jury for further consideration of its answers and verdict or may order a new trial. When the answers are inconsistent with each other and one or more is likewise inconsistent with the general verdict, the court shall not direct the entry of judgment but may return the jury for further consideration of its answers and verdict or may order a new trial.